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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-480

MELVIN HARVEY TOBIAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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MELVIN HARVEY TOBIAS,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying Petitioner's request for a hearing *In Banc* and/or a rehearing entered on September 3, 1971 amending the opinion of the Court entered on May 25, 1971. Chief Judge Seitz and Judges Gibbons and Adams dissented.

Opinions Below

The decision of the Court of Appeals is not yet reported. It is set out in the Appendix, *infra*, at p. 15. The decision of the District Court is likewise unreported and is set out in the Appendix at p. 11.

Jurisdiction

The judgment of the Court of Appeals denying Petitioner's request for a hearing *In Banc* and/or a rehearing was entered September 3, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether the decision of the Court below, holding that Petitioner's failure to appeal precluded him from attacking the composition of his Local Board, which is in conflict with the Exhaustion of Administrative Remedies Doctrine in the Fourth Circuit in *Eades* and the Fifth Circuit in *Davila,* should be reversed.

Statement of the Case

After successfully completing two and one-half years as a student at the University of Pittsburgh, Petitioner withdrew and was subsequently found acceptable for Military Service. Appellant did not take an appeal to the State Appeal Board. He reported for induction on April 21, 1969 as directed but refused to submit to induction.

At trial, the government stipulated that at all times in which Appellant's classification was considered four out of the five Local Board members did not reside within the jurisdiction of the Local Board. This stipulation also stated that, during this same period of time, there were five men who lived within the jurisdiction of Petitioner's Local Board and were members of other Local Boards.

Based on this stipulation, Petitioner argued his Local Board was illegally constituted and therefore lacked the authority to issue him an induction order. The trial court held the composition of Local Boards is not subject to collateral attack.

Petitioner was convicted and sentenced to three (3) years imprisonment for violating the Military Selective Service Act of 1967 in that he knowingly failed to submit to induction.

The Court of Appeals on May 25, 1971 held that Petitioner's failure to take an appeal to the State Appeal Board barred Petitioner from challenging the composition of his Local Board. The opinion of the Court of Appeals was *Per Curium.*

A hearing *In Banc* and/or a rehearing was sought by Petitioner to consider the sole question of whether the application of the doctrine of exhaustion of administrative remedies was properly applied in his case. On September 3, 1971, Petitioner's request for a hearing *In Banc* and/or a rehearing was denied and the Court's May 25, 1971 opinion was amended. Chief Judge Seitz and Judges Gibbons and Adams dissented.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted because the decision of the Court below holding that Petitioner's failure to appeal precluded him from attacking the composition of his Local Board, is in conflict with the exhaustion of administrative remedies doctrine in the Fourth Circuit in *Eades* and the Fifth Circuit in *Davila.*

Application of the doctrine of exhaustion of administrative remedies is inappropriate in this case because: (A) The issue involved is purely one of law; (B) the court's decision below misinterprets the governmental "compelling interest" test of *McKart;* and (C) exhausting administrative remedies would have constituted a futile formality.

Petitioner believes that the decision of the Court below is in conflict with at least two Courts of Appeals which have held that a registrant need not exhaust his administrative remedies before obtaining judicial review of a purely legal question. *United States v. Davila*, 429 F. 2d 481 (5 Cir. 1970) and *United States v. Eades*, 430 F. 2d 1300 (4 Cir. 1970).[1]

A. The issue involved is purely one of law.

Petitioner contends that his local board lacked the power to issue him an induction order.

This Court in the past has traditionally granted relief to those who have been injured by a governmental official who is acting in excess of his powers. *N. L. R. B. v. Highland Park Mfg. Co.*, 341 U. S. 322. In *Highland Park Mfg. Co.* this principle was expressed as follows:

> "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U. S. at 325-26.

For the same reasons, this Court should not allow an invalid selective service order, based solely on an erroneous

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[1] Compare *Wills v. United States*, 384 F. 2d 943 (9 Cir. 1967) and *Wolff v. Selective Service Local Board No. 16*, 372 F. 2d 817 (2 Cir. 1967). See also *McKart v. United States*, 395 U. S. 185 and *McGee v. United States*, 91 S. Ct. 1565.

interpretation of law, to go unreviewed simply because of a registrant's failure to exhaust his administrative remedies.[2]

B. The Court's decision below misinterprets the governmental "compelling interest" test of *McKart*.

This Court in *McKart v. United States*, 395 U. S. 185, warned that the:

> ". . . use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order." 395 U. S. at 197.

The Selective Service Regulations are quite complex. The registrant is expressly denied the right of counsel. 32 C. F. R. 1624.1 (b). The Regulations state only that the registrant "may" appeal his classification to the appeal board. 32 C. F. R. 1626.2(a). There is no indication in the act or regulations that a failure to appeal to the appeal board will bar judicial review. *McKart, supra*, 395 U. S at 206 (concurring opinion of Justice White).

For these reasons, a registrant's defense was not to be barred ". . . unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if denied judicial review." (Footnote omitted.) *McKart, supra*, 395 U. S. at 197.

This Court in *McKart*, went on to discuss those factors that must be considered in determining whether the govern-

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[2] The Courts of Appeals in selective service cases have applied the *Highland Park Mfg. Co., supra*, principle when the doctrine of exhaustion of administrative remedies has been used by the government in an attempt to bar consideration of a pure question of law where there is no factual dispute. *See* footnote 1 *supra*.

ment has a "compelling interest" in applying the exhaustion doctrine when a pure question of law is presented by a registrant defendant against a criminal prosecution. The factors are: (1) That ". . . judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise."; (2) that the registrant's rights may be vindicated without the necessity for court intervention if he is required to pursue his administrative remedies; (3) that the agency should ". . . be given a chance to discover and correct its own errors." *McKart, supra,* 395 U. S. at 194-95. These three factors, as in *McKart,* are completely inapplicable when the issue as here is a pure question of law and the government lacks a "compelling interest."

As to the first factor, Petitioner's claim, like McKart's, requires the application of a legal standard to an undisputed set of facts. The issue here, as in *McKart, supra,* ". . . was not one of fact and thus its resolution would not have been aided by the exercise of special administrative expertise; and proper interpretation of the statutory provision in question was not a matter for agency discretion." *McGee v. United States,* 91 S. Ct. 1565, 1569.

As to the second and third factors, the government had already determined that the local board was properly constituted by the initial act of the President in appointing the local board members. The local board members would not have disqualified themselves in order to vindicate Petitioner's rights. Short of disqualifying itself the local board was powerless to correct its own errors.[3]

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[3] Once a court determines that the government has no "compelling interest" the court must "also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would

(Footnote continued on following page)

The issue of whether local board members, if at all practicable, must live in the Board's jurisdictional area, is purely one of law. As in *McKart, supra.*

> "[T]he proper interpretation is certainly not a matter of discretion . . . judicial review would not be significantly aided by an additional administrative decision of this sort . . . ." (Footnote omitted.) 395 U. S. at 198-99.

The position urged by Petitioner has been expressly adopted by a number of Courts of Appeals. *Eades v. United States,* 430 F. 2d 1300 (4 Cir. 1970) and *United States v. Davila,* 429 F. 2d 481 (5 Cir. 1970). The *Davila* court's reasoning is singularly applicable to the case at bar:

> "Disposition of Davila's claim, like McKart's, required the application of a legal standard to an undisputed set of facts. Where the file reveals no facts refuting a registrant's claim of conscientious objection, the only question remaining is the legal issue of whether or not the registrant has made out a *prima facie* case for exemption." 429 F. 2d at 484.

Relying on *McKart, supra,* the Fifth Circuit Court of Appeals held that Davila's failure to take an appeal, although no explanation of his failure was offered at trial, did not bar judicial review of the legal issue he sought to raise in his defense.

(Footnote continued from preceding page)

seriously impair the Selective Service System's ability to perform its functions." *McKart, supra,* 395 U. S. at 197.

In the instant case, as in *McKart,* the exhaustion requirement is properly imposed only where the claim is one of fact and its resolution would be aided by "special administrative expertise" *McGee, supra,* 91 S. Ct. 1656, 1569. This Court in *McGee* also noted: ". . . proper interpretation of the statutory provision in question was not a matter for agency discretion." 91 S. Ct. at 1569. Petitioner submits the interpretation of a regulation like a statute is not a matter for agency discretion.

C. Exhausting administrative remedies would have constituted a futile formality.

There were no questions of credibility or factual disputes to be resolved by an administrative agency in Petitioner's case. The competency of the members of a local board, being jurisdictional, went to the validity of the local board's power to issue Petitioner an induction order. Since the President appoints local board members, the President not the Selective Service System determines the composition of the local board. The Court below erroneously stated: "And since the statutory apparatus for establishing local boards is vested *within* the system itself, it is there that such a challenge must first be brought." (Emphasis added.) Slip Opinion Page 4. Only the President who is *outside* the system can correct the composition of the local board. 32 C. F. R. 1604.52 (a).

The exhaustion doctrine is properly invoked only where the registrant "has failed to pursue normal administrative remedies and thus has sidestepped a corrective process which might have cured or rendered moot the very defect later complained of in Court." *McGee, supra*, 91 S. Ct. at 1568.

Where exhaustion of administrative remedies is an empty formality, exhaustion is not required. *Leedom v. Kyne*, 358 U. S. 184.

Furthermore, Petitioner could not have learned the addresses of his local board members at any time before trial so as to present this issue to his appeal board. Regulation 1606.62 provides that home addresses of local board members will not be released without either (1) the consent of the board members involved, or (2) the board chairman's determination in writing, after consultation with the board

members affected, that disclosure would not harm them or constitute a clearly unwarranted invasion of their personal privacy. 32 C. F. R. 1606.62. Regulation 1606.63 further provides that information sought by subpoena or other court process shall not be released without permission from the Director of Selective Service. 32 C. F. R. 1606.63. It has been the policy of the government in Pittsburgh to deny information pertaining to local board members' addresses even to defendants defending Selective Service prosecutions.[4]

Assuming *arguendo* that the doctrine of exhaustion of adminstrative remedies is applicable to Petitioner's case, the obstacle imposed by Regulation 1606.62 effectively barring Petitioner from obtaining the address of his local board members provides an "exceptional circumstance" so as to excuse his failure to appeal. *Davis v. United States*, 413 F. 2d 148 (4 Cir. 1969) and *Wills v. United States*, 384 F. 2d 943 (9 Cir. 1967).

Conclusion

Petitioner seeks only to point out in his own defense that his induction order was issued by a local board acting in violation of an explicit regulation. The refusal on the part of the Court below to allow Petitioner to present his defense has permited an invalid selective service order to go unreviewed by that Court and Petitioner has been sentenced to three years in prison for his refusal to obey that invalid order.

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[4] See Government's motion to quash defendant's subpoenas, seeking board members' addresses in the District Court. *United States v. Tobias's*, No. 69-262 Criminal (Unreported). Petitioner's Appendix at pp. 23.

In the present case there is no dispute of fact and the issue presented to the Court below was solely one of law, which the Courts are equally as competent, as an appeal board, if not more competent, to determine.

With no governmental "compelling interest" and with a pure question of law, the exhaustion doctrine should not apply. Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

MICHAEL P. MALAKOFF,

and

ALLAN H. COHEN,
Attorneys for Petitioner.

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MELVIN HARVEY TOBIAS,
Defendant.

Criminal Action N. 69-262.

Opinion of the United States District Court

MEMORANDUM.

(Filed May 8, 1970.)

Defendant was indicted for failure to comply with an order of Local Board 16, Allegheny County, Pennsylvania, with which he was duly registered, to submit to induction into the Armed Forces of the United States, in violation of the Military Selective Service Act of 1967, Title 50 U. S. C. A., App. Section 462(a). He was tried without a jury on February 2, 1970. Defendant's Selective Service file, which was admitted into evidence, discloses the following undisputed facts: that on December 15, 1967, Tobias was classified 2-S until October 1, 1968. No information concerning his status was received by the Board between Oc-

tober, 1968, and January 8, 1969, when he was reclassified 1-A and notified of his right to appeal the classification within thirty days. On January 17, 1969, the Local Board sent Tobias a notification that he had been found acceptable for induction and received a letter from him in which he stated that he had withdrawn from college on January 6, 1969, and requested Selective Service Form 150 "Special Form for Conscientious Objectors" in order "to begin procedures for 1-O classification." The form was sent to him the same day with a return date of February 17, 1969; neither the Form 150 nor any other claim for conscientious objector status was submitted to the Local Board and on March 26, 1969, defendant was ordered to report for induction on April 21, 1969; he reported to the designated place on the date specified but refused to submit to induction.

Defendant raises six points in support of a motion for judgment of acquittal:

1—Defendant was illegally reclassified in January, 1967, from 2-S to 1-A.

2—The Local Board lacked jurisdiction to order defendant's induction because a majority of its members failed to meet certain residential requirements.

3—Defendant failed to meet minimum physical requirements for induction.

4—The request for a Form 150 was a claim for conscientious objection which the Board failed to consider in violation of Local Board Memorandum 41.

5—The induction order was not authorized by the Local Board.

6—Defendant's Selective Service file was inadmissible and there is insufficient evidence to support a finding of guilty.

With respect to the first and fourth points raised, failure to return Form 150 or to submit any other written communication claiming conscientious objection, and his failure to avail himself of the Selective Service appeal procedures, although notified thereof, bar his right to challenge here the validity of his 1-A classification. *U. S. v. Palmer,* 223 F. 2d 893 (3 Cir.) cert. den. 350 U. S. 873.

Defendant's third contention is not supported by the evidence. His Form 88, Report of Medical Examination, dated April 21, 1969, specifically states that he was physically qualified for induction.

The second proposition advanced by the defendant, pertaining to the residential qualifications of Local Board members, is dealt with in *U. S. v. Brooks,* 415 F. 2d 502 (6 Cir. 1969) and *U. S. v. Nussbaum,* 306 F. Supp. 66 (N. D. Cal. 1969). *Brooks* holds that the composition of Local Boards is not subject to collateral attack in defense of a prosecution to submit to induction, and *Nussbaum* finds Reg. 1604.52(c) relating to residence of members within a Local Board's jurisdiction directory only, the sole statutory requirement being residence within the county in which the Board is located. The Local Board which issued the notice in this case was duly constituted.

Defendant's fifth point is contrary to the teachings of *U. S. v. Lawson,* 337 F. 2d 800 (3 Cir. 1964):

> "The appellant is entitled to full protection of his procedural rights, but he may not insulate himself against the requirement that he perform his obligation under the Selective Service Law by relying on mere procedural irregularities which expose him to no prejudice."

In the instant case, not only was there no prejudice to any of the registrant's rights, but there was no irregularity in the Board clerk's issuance of the notice to report for induction—a purely ministerial function.

Finally, *U. S. v. Rhyne,* 407 F. 2d 657 (7 Cir. 1969) and *Kemp v. U. S.,* 415 F. 2d 1185 (5 Cir. 1969), negative the defendant's attack upon the admissibility in evidence of the registrant's entire Selective Service file, including communications from the Army Induction Center.

The defendant was properly classified and duly ordered to report for and submit to induction. He wilfully refused to do so, and is adjudged guilty as charged.

HERBERT P. SORG, *D. J.*

Dated: May 8, 1970.

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,351

UNITED STATES OF AMERICA,
v.
MELVIN HARVEY TOBIAS,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 6, 1971.

Before HASTIE, *Chief Judge,* and KALODNER and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT.

(Filed May 25, 1971.)

PER CURIAM:

This is an appeal from a conviction for unlawfully failing to report for induction into the armed services. Certain of the errors relied upon by appellant "presuppose that he perfected a claim for conscientious objector status that should have been, but was not, processed by his local board." *United States v. Silvera,* ____ F.2d ____ (No. 19,242, May 12, 1971, 3 Cir.). Originally issued a II-S deferment based

on his status as a student at the University of Pittsburgh, appellant was later classified I-A. He was mailed Form 217, "Advice of Right to Personal Appearance and Appeal," which informed him that he had 30 days from the I-A reclassification in which to ask for a personal appearance or to appeal. Nine days thereafter he wrote as follows: "I, Melvin Tobias, request Form SS 150 to begin procedures for I-O classification." The secretary of the local board, complying with his request, sent him the form, returnable on or before February 17, 1969. The registrant did not fill out the requested Form 150 and did not return it to the board. Later he was mailed and requested to complete and return a "Current Information Questionnaire" (Form 127). This too was ignored by the registrant.

22 C. F. R. § 1621.11 requires a registrant seeking C. O. status to "offer information in substantiation of his claim" on Form 150. Local Board Memorandum No. 41, then in effect, provided that "[a] registrant should be considered to have claimed conscientious objector to war if he has signed series VIII of the classification questionnaire (SS Form No. 100), if he has filed a special form for conscientious objector (SS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector."

We have concluded that the naked request for a Form 150 does not qualify as a "written statement claiming that [one] is a conscientious objector." Moreover, because the registrant failed to complete and return the furnished Form 150, "the board was entitled to proceed, as it apparently did, on the reasonable assumption that no c.o. claim was being asserted. "*United States v. Silvera, supra.*

Appellant also contends that the local board was illegally constituted, because three of the five members were

not residents of the area in which the local board had jurisdiction. Regulation 1604.52(c) then provided:[1]

> The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction.

It was stipulated at trial that five members of boards other than the local board in question resided within the area but were not members of this board.

Appellant's challenge to the constitution of his local board was first asserted as an attack on his classification made in his defense to the criminal proceedings below. At no time did the registrant so challenge his classification at any administrative level of the Selective Service System.[2] This failure to exercise his right of appeal, and so to exhaust his available administrative remedies, bars this subsequent attack. *United States v. Zmuda*, 423 F.2d 757, 761 (3 Cir. 1970); *United States v. Grundy*, 398 F.2d 744, 746 (3 Cir. 1968); *DuVernay v. United States*, 394 F.2d 979, 981 (5 Cir. 1968), *aff'd* 394 U. S. 309, 89 S. Ct. 1186, 22 L. Ed. 2d 306 (1969).

In *United States v. Deans*, 436 F.2d 596, 600 (3 Cir. 1971), this court said:

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[1] 32 C.F.R. 1604.52(c) presently provides:

> The members of local boards shall be citizens, male or female, of the United States who shall be residents of the county in which their local board has jurisdiction.

[2] A registrant has the right to appear before his local board to contest his classification, 32 C.F.R. §§ 1624.1, 1624.2, and to appeal to the state appeal board from an adverse decision, 32 C.F.R. §§ 1624.2(e), 1624.13. A further appeal may be taken by the registrant to the National Selective Service Appeal Board if one or more member of the state appeal board dissents from the board's decision, 32 C.F.R. § 1627.3.

> In McKart v. United States, 395 U. S. 185, 89 Sup. Ct. 1657, 23 L. Ed. 2d 194 (1969), the Supreme Court set forth a number of guidelines for the application of the exhaustion doctrine in selective service cases. The Court began with the premise that a registrant's failure to appeal his classification should not foreclose all judicial review in a criminal case *unless there is a compelling governmental interest to be served in having the selective service system decide the case before it reaches the courts.* [emphasis supplied]

There is potently a "compelling governmental interest" in placing before the Selective Service System a challenge to the constitution of one of its local boards. This interest is manifested in a statutory scheme which entrusts to the Selective Service System the power to define the jurisdiction and composition of the local boards.[3] And since the statutory apparatus for establishing local boards is vested within the system itself it is there that such a challenge must first be brought. The government has a justified interest in insuring that challenges to the manner in which its selective service regulations are implemented are timely and expeditiously raised before the very administrative agency on whose expertise in these matters Congress so heavily relies. This is particularly true where, as here, the basis on which board action is challenged is neither consti-

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[3] Military Selective Service Act of 1967, § 10(b)(3). Local board areas are established by the State Director of Selective Service, 32 C.F.R. § 1604.51, who is himself appointed by the President of the United States upon the recommendation of the state's governor, 32 C.F.R. § 1604.11. Local board members are also appointed by the President upon the Governor's recommendation, 32 C.F.R. § 1604.52(b).

Appeals from board decisions are not limited to the registrant. The state director or national director may appeal to the National Selective Service Appeal Board from any determinations of the state appeal board, 32 C.F.R. § 1627.1.

tutional nor statutory, but emanates from a regulation promulgated from within the Selective Service System itself.[4]

We hold that because appellant did not challenge the composition of the board at any level in the Selective Service System, he was precluded from raising it for the first time as a defense in a criminal prosecution for failure to report for induction. *United States v. Brooks*, 415 F.2d 520, 505 (6 Cir. 1969).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[4] The Military Selective Service Act of 1967, like the present regulation, requires only that "each member of any local board shall be a civilian who is residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction. . . ." 50 App. U.S.C. § 460(b)(3).

Amended Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,351

UNITED STATES OF AMERICA,
v.
MELVIN HARVEY TOBIAS,
Appellant.

Present: KALODNER, HASTIE and ALDISERT, *Circuit Judges.*

ORDER.

IT IS ORDERED that the slip opinion heretofore filed be and the same is amended as follows:

A. Insert "usually" after "must" in line 9, page 4.

B. The first full paragraph beginning on page 4 is deleted and the following substituted therefor: "We hold that because appellant did not challenge the composition of the board at any level in the selective service system, he was precluded from raising it for the first time as a defense in this prosecution. We emphasize that we decide only that a challenge to a local board on the ground that a majority of its members are not residents of the area in which the local board has jurisdiction may not be first asserted as a defense to criminal proceedings under the circumstances presented by this record, *i.e.*, where no spe-

cific allegation of discrimination, bias, or prejudice has been lodged against the board."

By the Court,

RUGGERO J. ALDISERT,
Circuit Judge.

Dated: September 3, 1971.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Government's Stipulation of Local Board Members' Addresses

STIPULATION.

(Filed February 18, 1970.)

WHEREAS, This case came on for non-jury trial before Judge Herbert P. Sorg on February 2nd, 1970.

WHEREAS, The Government presented a motion to quash defendant's subpoenas of members of Local Board No. 17.

WHEREAS, Three members of Local Board No. 17 were present in open court in response to defendant's subpoenas at the opening of said trial. Said members being:

Frank E. Foote
William T. Kiehl, Jr.
A. B. Wadsworth

WITNESSETH

It is hereby stipulated and agreed by and between Melvin Harvey Tobias, defendant, by his counsel, Allan H. Cohen, and the United States Government by First Assistant Blair A. Griffith, that the following facts are before the Court for the purpose of rendering a decision in this case:

1. The geographical area encompassed by Local Board No. 7 during the period from January 1, 1966 to and including May 1, 1969, consisted of Wards Seven, Eight and Eleven in the City of Pittsburgh, Allegheny County, Pennsylvania.

2. During the same period the average total population (men, women and children) was as follows:

Seventh Ward:	17,500
Eighth Ward:	18,700
Eleventh Ward:	23,500

3. During the same period the total membership of Local Board No. 17 consisted of the following persons:

Name	*Residence*	*County*
Frank E. Foote	Fourth Ward, Pgh., Pa.	Allegheny
Robert W. Fehl	Whitehall Borough	"
William T. Kiehl, Jr.	Eighth Ward, Pgh., Pa.	"
A. B. Wadsworth	Fourteenth Ward, Pgh., Pa.	"
Alvin E. Berman	Fifteenth Ward, Pgh., Pa.	"
C. Warner McVicar (resigned 10/10/67)	Eighth Ward, Pgh., Pa.	"

NOTE: Mr. McVicar was replaced by Mr. Berman.

4. During the above period there were twenty Selective Service Boards for the entire Allegheny County and of these twenty boards, the following persons resided in

either Wards Seven, Eight and Eleven but were members of other boards as follows:

Name	*Ward*	*Board*
Raymond A. Byrne	Eleventh	5
John R. Young	Eleventh	9
Max Keyser	Eighth	19
Nathan Darling	Seventh	19
Martin S. Bidt	Seventh	21

Witness our hand and seals this day of , 1970.

/s/ ALLAN H. COHEN,
Attorney for Melvin Harvey Tobias.

/s/ BLAIR A. GRIFFITH,
First Assistant U. S. Attorney.

Government's Motion to Quash Defendant's Subpoena

MOTION TO QUASH SUBPOENA.

And now comes the United States by Gustave Diamond, United States Attorney, and George E. Schumacker, Assistant United States Attorney, and moves this court to quash the subpoena served on Margaret McMackin, Executive Secretary of Local Board No. 10 of the Selective Service System located in the Federal Building, Pittsburgh, Pennsylvania, and as grounds therefore sets forth as follows:

1. The names, addresses and tenure of the local board members are irrelevant to any issue in the case; . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-480

MELVIN HARVEY TOBIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of willfully refusing to submit to induction, in violation of 50 U.S.C. App. 462 (a); he was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 15-19).[1]

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[1] An amended opinion was filed by the court of appeals on September 3, 1971 (Pet. App. 20-21).

Petitioner registered with Local Board Number 16, Pittsburgh, Pennsylvania, and on December 15, 1967, he was classified II-S as a full-time college student. After holding that deferment for approximately a year, petitioner was reclassified I-A on January 8, 1969, since he had failed to furnish the board with evidence of continuing student status. He was promptly notified of his reclassification and was advised of his right to a personal appearance or an administrative appeal, and of the availability of a government appeal agent to assist him. Petitioner did not pursue his appeal rights.

On January 17, 1969, petitioner wrote to the board, advising that he had withdrawn from college on January 6, 1969; he requested a Special Form for Conscientious Objectors (SSS Form 150). The form was mailed to him on the same day, with a return date of February 17, 1969; it was never returned.

On March 26, 1969, petitioner was ordered to report for induction on April 21, 1969. He reported as scheduled but refused to take the symbolic step forward. The present conviction followed and the court of appeals affirmed *per curiam* (Pet. App. 15-19).

1. Petitioner contends here, as he did below, that his conviction should be overturned because three of the five local board members lived outside the area in which the local board had jurisdiction, purportedly in conflict with the then applicable area residency regulation, 32 C.F.R. (1969 ed.) 1604-52(c). He objects particularly to the court of appeals' holding that he is precluded from raising this claim in the courts because he failed to exhaust his administrative remedies.

The position of the court below is, however, well taken. At no time during the administrative process did petitioner raise an objection to his I-A classification. While he did request a conscientious objector form, a form was mailed to him and he never returned it; nor did he submit any other information to the board indicating that he intended to claim exempt status as a conscientious objector, or that he was entitled to a I-O classification. Having failed to contest his classification administratively, he should not now be permitted to come into court and challenge it for the first time in the judicial process.

This is especially so where the claim here goes not at all to the merits of his classification, but involves only a collateral attack on the composition of the local board that issued the order of induction. Whatever the composition of the board, that factor has little relevance in the particular circumstances of this case since petitioner's acceptability for military service was "not dependent upon an act of judgment by the Board." *Clark* v. *Gabriel*, 393 U.S. 256, 258. Petitioner was required to register when he attained the prescribed age, regardless of the composition of the local board (50 U.S.C. App. 453; cf. *Toussie* v. *United States*, 397 U.S. 112). His deferment as a full-time college student rested on the fact that he met the specific requirements of the governing regulations (see 32 C.F.R. 1622.25). When in 1969 he failed to provide information which would warrant continuation of the deferment,[2] the local board had no choice but to clas-

[2] As indicated earlier, on January 17, 1969, petitioner advised the board that he had withdrawn from college and was no longer a full-time student at the university.

sify him I-A (see 32 C.F.R. 1622.10, 1622.25). Petitioner thereafter passed the requisite physical examination and was available to be called in proper sequence. The order of priority of induction was therefore automatic (see 32 C.F.R. 1631.6-1631.7), and the board's role was essentially ministerial. It is therefore entirely artificial to argue that the composition of the board has any impact on this case.

2. At all events, the failure of local board members to satisfy the "area residency" requirement is not sufficient to nullify action taken by the board. The regulatory provision (32 C.F.R. (1969 ed.) 1604.52 (c)) that members reside in "the area in which their local board has jurisdiction"—which was repealed by executive order on September 2, 1970 (Executive Order 11555, 35 Fed. Reg. 14191)—was by its terms not absolute, but rather turned on a determination of practicability; 32 C.F.R. (1969 ed.) 1604.52(c) provided that local board members shall "if at all practicable, be residents of the area in which their local board has jurisdiction."

It has long been recognized that acts of draft boards, like those of malapportioned legislatures (cf. *Baker* v. *Carr*, 369 U.S. 186), "are acts of a de facto political authority," *Clay* v. *United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds, *sub nom. Giordano* v. *United States*, 394 U.S. 310; *Sellers* v. *McNamara*, 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950. As such they are valid despite irregularities in the composition of the board and are not subject to collateral attack. See, *e.g.*, *United States* v. *Collins*, 426 F. 2d 765 (C.A. 5), certiorari denied, 400 U.S. 919; *Czepil* v. *Hershey*, 425 F. 2d 251

(C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *United States* v. *Chaudron*, 425 F. 2d 605 (C.A. 8), certiorari denied, 400 U.S. 852; *United States* v. *Reeb*, 433 F. 2d 381 (C.A. 9). This principle, "founded upon considerations of policy and necessity" (*Norton* v. *Shelby County*, 118 U.S. 425, 441), applies with equal force whether the regulation is viewed as mandatory (cf. *United States* v. *Nussbaum*, 306 F. Supp. 66, 67 (N.D. Cal.)) or as directory (*United States* v. *Wallace*, 435 F. 2d 12 (C.A. 9), certiorari granted and cause remanded on other grounds, 403 U.S. 902). As this Court observed in *Ex parte Ward*, 173 U.S. 452, 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked."[3]

3. Moreover, as we have pointed out, the area residency requirement was repealed by executive order on September 2, 1970, leaving as the only residency requirement that members of the local boards must reside in the county served by the board (50 U.S.C. App. 460(b)(3); 32 C.F.R. (1971 ed.) 1604.52 (c)). Consequently, the question raised here concerning the

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[3] Nor does the Sixth Circuit's decision in *United States* v. *Cabbage*, 430 F. 2d 1037 hold otherwise. In *Cabbage*, a criminal conviction for refusal to report for induction, the court of appeals declined to invalidate an induction order on the ground that the local board was not properly constituted under 32 C.F.R. 1604.52(c). Since it found the order to be invalid on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the then existing area residency requirement, stating that Cabbage would not be subject to reclassification until this was done.

composition of petitioner's local board is not one of continuing legal significance requiring further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

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